PP

v.

SYED FEISAL YAHYA

HIGH COURT MALAYA, JOHOR BAHRU
AHMAD ZAIDI IBRAHIM JC
[CRIMINAL TRIAL NO: MT(4) 45-30-2004]
20 APRIL 2007

CRIMINAL PROCEDURE: *Sentence - Principles of sentencing - Court to take into account other pending charges against prisoner - Prosecution withdrawing one charge after accused pleading guilty to the other - Whether court bound to consider withdrawn charge thereof - Whether there was no pending charge before the court - Criminal Procedure Code, s. 171A*

CRIMINAL PROCEDURE: *Sentence - Adequacy - Possession of 54,572 grams of cannabis - Appropriate sentence - Dangerous Drugs Act 1952, ss. 6, 39A(2)*

The accused, aged 51 years, was charged with two counts of trafficking in cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). Subsequently, however, the prosecution offered an alternative charge of possession of 54,572 grams of cannabis under s. 6 DDA in respect of the second charge, whereof the accused pleaded guilty and was accordingly convicted by the court. The prosecution then withdrew the first charge, resulting in the court acquitting and discharging the accused thereon. The withdrawal of the first charge notwithstanding, the prosecution insisted that the court should take into consideration the offence in the first charge in passing sentence on the alternative charge. According to the learned DPP, such a course was not only called for by the decisions in *Flady bin Dading v. PP* and *Hashim Pawanchee v. PP* but consonant with the provisions of s. 171A of the Criminal Procedure Code ('CPC'). It was not disputed that the accused had no objection to the prosecution's application aforesaid. That being so, a question arose as to whether the court, in the absence of any objection by the accused, could, for the purpose of sentencing, take into consideration an offence/charge which had been withdrawn and in respect of which the accused had already been acquitted and discharged by the court.

Held (answering question in the negative on the facts):

(1) The operative words of s. 171A CPC are that the court, in passing sentence, may, with the consent of the prosecutor and the accused, take into consideration **any other outstanding offence or offences** which the accused admits to have committed. (para 18)

(2) The prosecution in this case, relying on s. 171(1) CPC, had exercised its prerogative to withdraw the first charge, with the result that the court acquitted and discharged the accused of that charge. Consequently, there was **no other pending or outstanding offence** against the accused before the court that could be taken into consideration at the time of the learned DPP's application. Section 171A is therefore inapplicable notwithstanding the non-objection by the accused. (paras 19 & 20)

(3) Unlike in the present case, there are cases still pending before the respective courts in the two cases cited by the prosecution. Those cases are therefore distinguishable on the facts. (para 18)

(4) Considering the relevant factors, a sentence of 15 years imprisonment is appropriate in the circumstances. A lighter sentence would make a mockery of the principle of sentencing and the intention of Parliament. The accused is however spared of whipping on account of his age. (para 25)

Case(s) referred to:

Abang Zailan Abang Zainal v. PP [1992] 1 CLJ 85; [1992] 2 CLJ (Rep) 1 HC ***(refd)***

Flady Dading v. PP [1994] 3 CLJ 738 HC ***(dist)***

Hashim Pawanchee & Anor v. PP [1988] 2 MLJ 66 ***(refd)***

Mohamad Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC ***(refd)***

PP v. Ravindran & Ors [1993] 1 MLJ 45 ***(refd)***

PP v. Sidek Abdullah [2006] 1 CLJ 314 HC ***(refd)***

PP v. Sulaiman Ahmad [1992] 4 CLJ 2283; [1992] 3 CLJ (Rep) 447 HC ***(refd)***

PP v. Yap Huat Seng [1985] 2 MLJ 414 ***(refd)***

Sau Soo Kim v. PP [1975] 2 MLJ 134 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 121A, 171A, 171(1), 289(c), 298(2)
Dangerous Drugs Act 1952, ss. 6, 39A(2), 39B(1)(a), (2)

For the accused - Rohaya Halil
For the prosecution - Ahmad Akram Gharib; DPP

Reported by WA Sharif

JUDGMENT

Ahmad Zaidi Ibrahim JC:

Background

[1] The accused was charged with two counts of trafficking in dangerous drugs under s. 39B(1)(a) Dangerous Drugs Act 1952 (DDA). He was charged under two separate cases *viz*. MT [1] 45-27-2004 (the first case) and MT [4] 45-30-2004 (the second case). The two respective charges are as follow:

(i) Perbicaraan Jenayah No. MT(1) 45-27-2004 (the first case)

Tuduhan Pindaan

Bahawa kamu pada 24 Mei 2003, jam lebih kurang 12.30 tengahari, di Jalan Sempadan, Kampong Melayu Majidee, Majidee, didalam daerah Johor Bahru, di dalam Negeri Johor Darul Ta'zim, telah didapati mengedar dadah berbahaya iaitu sejumlah 933 gram Cannabis dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

(ii) Perbicaraan Jenayah No MT(4) 45-30-2004 (the second case)

Tuduhan Pindaan

Bahawa kamu pada 24 Mei 2003, jam lebih kurang 9.30 malam, No. 18, Jalan Anggerik 26, Taman Johor Jaya, didalam daerah Johor Bahru, di dalam Negeri Johor Darul Ta'zim, telah didapati mengedar dadah berbahaya iaitu sejumlah 54,571.18 gram Cannabis dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] He claimed trial to both charges and the cases were fixed for joint-trial before me. To start on with the trial the prosecution called three witnesses. The cases were then adjourned for continuation.

[3] On the date fixed for continued-hearing (3 April 2007), the learned Deputy Public Prosecutor (DPP) Encik Ahmad Akram bin Gharib tendered an alternative charge for the second case to which the accused pleaded guilty. The alternative charge reads as follow: Perbicaraan Jenayah No MT(4) 45-30-2004

Tuduhan Pilihan

> Bahawa kamu pada 24 Mei 2003, jam lebih kurang 9.30 malam, No. 18, Jalan Anggerik 26, Taman Johor Jaya, di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Ta'zim, telah didapati memiliki dadah berbahaya iaitu sejumlah 54,572 gram Cannabis, oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 6 Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39A(2) Akta yang sama.

[4] The learned DPP then went on to tender the facts of the case together with the relevant exhibits, all of which were admitted by the accused as true. Accordingly I found the accused guilty and convicted him of the said alternative charge.

[5] At that juncture the learned DPP applied to the court to withdraw the first case. As such, by virtue of s. 171 Criminal Procedure Code (CPC) I accordingly acquitted and discharged the accused of the said charge.

[6] With regards to the second case which he pleaded guilty, the accused mitigated for leniency, giving grounds/factors commonly adduced by most accused person. The prosecution in turn pressed for a heavy sentence to be imposed onto the accused. Apart from that, the learned DPP also applied to the court to "take into consideration" the offence for the first case. According to the learned DPP, the accused have no objection for the said offence/charge be taken into account. The learned DPP then invited the court to confirm the said matter with the accused and his counsel as required by s. 171A CPC.

[7] Having considered the matter, with respect, I found that the application by the prosecution under that particular section is without merit and baseless. I found that the said provision is

inapplicable in the circumstances of this case and as such I rejected the application despite the fact that the accused not objecting.

[8] As for the second case I sentenced the accused to 15 years imprisonment effective from the date of his arrest. The accused being 51 years of age at the time of sentence was spared the sentence of whipping by virtue of s. 298(2) CPC.

Issues

[9] Whether the court, in absence of any objection by the accused can/may for the purpose of sentencing "take into consideration" an offence/charge which had earlier been withdrawn and to which the accused had been acquitted and discharged?

[10] Whether the sentence imposed for the second case was appropriate in the circumstances?

Decision

[11] First Issue – "taking into consideration"

As provided by s. 121A CPC, for the purpose of sentencing, the court is given the discretion as to whether or not to take into consideration other offences pending against the accused person. In the case of *Abang Zailan bin Abang Zainal v. PP* [1992] 1 CLJ 85; [1992] 2 CLJ (Rep) 1 Chong Siew Fai J had this to say: "... s. 171A(i) uses the word 'may'. In *R v. Smith,* Darling J, in explaining the duty of the presiding judge, said:

> ... A judge is not bound, in passing sentence, to take into account other charges pending against a prisoner. In *Syres* 73 JP 13; 25 TLR 71; 1 Cr App R 172: 1908, it was decided that a judge may, in passing sentence, take into account other charges which a prisoner admits.

[12] For ease of reference on this issue s. 171A Criminal Procedure Code (CPC) are set out as follows:

> (i) Where in any criminal proceedings instituted by or on behalf of the public prosecutor the accused is found guilty of an offence, the Court, in determining and in passing sentence, may, with the consent of the prosecutor and the accused, take into consideration any other outstanding offence or offences which the accused admits to have committed:

A Provided that, if any criminal proceedings are pending in respect of such outstanding offence or offences and such proceedings were not instituted or on behalf of the public prosecutor, the Court shall first be satisfied that the person or authority by whom such proceedings were instituted consents to that course.

B (ii) When consent is given as in subsection (i) and an outstanding offence is taken into consideration, the Court shall enter or cause an entry to that effect to be made on the record and upon sentence being pronounced the accused shall not, unless the conviction which has been had is set aside, be liable to be C charged or tried of any such offence so taken into consideration.

[13] Relying on the above provision the learned DPP urged the court to take the charge/offence in first case into consideration on account that the accused had consented to it. To support his argument he cited the cases of *Flady bin Dading v. Public Prosecutor* D [1994] 3 CLJ 738 and *Hashim bin Pawanchee & Anor v. Public Prosecutor* [1988] 2 MLJ 66.

[14] In *Flady bin Dading (supra)* the facts of the case are somewhat similar to our present case in that the accused there E was initially charged with two offences. In the course of the trial, the accused changed his plea and chose to plead guilty to the first charge. Both the prosecuting officer and the counsel then informed the court that they had no objection if the (second charge) be taken into consideration under s. 171A of the CPC for the F purpose of sentencing.

[15] According to Ian HC Chin J "... it follows from the wordings – "offence or offences which the accused admits to have committed" (in s. 171A of the Criminal Procedure Code) that the G court must establish by inquiry that the accused admits his guilt with regard to the outstanding offence which, in this case is the offence related in the second charge. To do this, the court must in open court ask the accused whether he admits the offence related in the second charge".

H **[16]** The learned DPP, quoting the above passage invited the court to ask the accused as to whether or not he admits the offence/charge for the first case, as both the prosecution and counsel had consented. The learned DPP submitted that the fact a case is no longer pending/outstanding is immaterial and has no I bearing.

[17] With respect, after having perused through the wordings of s. 171A CPC, to me, it is plain to see that before the court could exercise its discretion, apart from parties consenting, the other offence/offences to be taken into consideration must be one that is still outstanding/pending before the court.

[18] The operative words of s. 171A CPC are that the court, in determining and in passing sentence, may, with the consent of the prosecutor and the accused, take into consideration any other outstanding offence or offences which the accused admits to have committed. Thus, the court in exercising that discretion may only consider cases which are still pending/outstanding in the court. In the two cases cited by the learned DPP above it is crystal clear that cases taken into consideration are cases still pending/outstanding before the respective courts, unlike in our case where it had been withdrawn.

[19] As earlier mentioned, the learned DPP relying on the provision of s. 171(1) CPC exercised the prosecution's prerogative to withdraw the charge for the first case. Flowing from that the accused must be acquitted as s. 171 Criminal Procedure provides that:

> (1) When more charges than one are made against the same person and when a conviction has been had on one or more of them, the officer conducting the prosecution may, with the consent of Court, withdrew the remaining charge or charges, or the Court of its accord may stay the inquiry into or trial of the charge or charges.
>
> (2) Such withdrawal or stay shall have the effect of an acquittal on such charge or charges, unless the conviction is set aside, in which case the said Court (subject to the order of the Court setting aside the conviction) may proceed the inquiry into or trial of the charge or charges so withdrawn or not proceeded with.

[20] On that premise, I found that there was no any other pending or outstanding offence against the accused before me that could be taken for consideration at the time of the learned DPP's application. As such, I found that s. 171A CPC is therefore inapplicable here and therefore the invitation by the learned DPP to inquire the accused must be declined notwithstanding there being no objection from the accused himself.

Sentencing

[21] Second Issue – Sentencing.

For the offence of possession in dangerous drugs, s. 39A(2) DDA 1952 provides for the imposition of imprisonment for life or for a term not less than five (5) years and whipping of not less than ten (10) strokes.

As for whipping s. 289 CPC provides amongst others, that no male person above the age of fifty (50) shall be whipped.

[22] Before handing down the sentence of 15 years imprisonment on to the accused I took into account all the factors given in mitigation. I acknowledged the fact that the accused being a first offender and who had pleaded guilty is entitled to be given some discount or credit (the cases of *Sau Soo Kim v. Public Prosecutor* [1975] 2 MLJ 134, *Public Prosecutor v. Sulaiman bin Ahmad* [1992] 4 CLJ 2283; [1992] 3 CLJ (Rep) 447, *Public Prosecutor v. Ravindran & Ors* [1993] 1 MLJ 45, *Mohamad Abdullah Ang Swee Kang v. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 referred to).

[23] However, those two are but minor factors compared to public interest which supercede other considerations. Although the accused is entitled to some credit for pleading guilty and being a first offender, that must be set off against the seriousness of the crime committed (the case of *PP v. Yap Huat Seng* [1985] 2 MLJ 414 referred to).

[24] In the case of *PP v. Sidek Abdullah* [2006] 1 CLJ 314 Hishamudin Yunus J sentenced the accused who had pleaded guilty to an amended charge of having in possession 44,023.3 grams Cannabis to 12 years imprisonment. In comparison, the amount of drugs involved in our case is substantially more (54,571.18 grams).

[25] As such after having considered all the relevant factors I accordingly sentenced the accused to 15 years imprisonment to take effect from the date of his arrest. A lighter sentence I feel would make a mockery of the principle of sentencing and the intention of Parliament. As for the sentence of whipping, pursuant to s. 289(c) CPC the accused being fifty-one (51) years of age was not ordered to be whipped.